

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

DARRYL LLOYD WHITE,

Plaintiff,

vs.

JIM GIBBONS, *et al.*,

Defendants.

2:08-cv-0388-RLH-LRL

**ORDER**

This is a civil rights action pursuant to 42 U.S.C. § 1983, filed by Darryl White, a prisoner at High Desert State Prison. Plaintiff filed a motion for reconsideration of this Court's order (docket #13) denying his motions for preliminary injunction (docket #23). Plaintiff also moves the Court to reconsider its screening order (docket #14) in which it dismissed some claims and defendants with prejudice (docket #24).

Where a ruling has resulted in final judgment or order, a motion for reconsideration may be construed either as a motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e), or as a motion for relief from judgment pursuant to Federal Rule 60(b). *School Dist. No. 1J Multnomah County v. AC&S, Inc.*, 5 F.3d 1255, 1262 (9<sup>th</sup> Cir. 1993), *cert. denied* 512 U.S. 1236 (1994).

Under Fed. R. Civ. P. 60(b) the court may relieve a party from a final judgment or

1 order for the following reasons:

2 (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly  
3 discovered evidence which by due diligence could not have been  
4 discovered in time to move for a new trial under Rule 59(b); (3) fraud  
5 (whether heretofore denominated intrinsic or extrinsic),  
6 misrepresentation, or other misconduct of an adverse party; (4) the  
7 judgment is void; (5) the judgment has been satisfied, released, or  
8 discharged, or a prior judgment upon which it is based has been  
9 reversed or otherwise vacated, or it is no longer equitable that the  
10 judgment should have prospective application; or (6) any other reason  
11 justifying relief from the operation of the judgment.

12 Motions to reconsider are generally left to the discretion of the trial court. *See Combs v. Nick Garin*  
13 *Trucking*, 825 F.2d 437, 441 (D.C. Cir. 1987). In order to succeed on a motion to reconsider, a party  
14 must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior  
15 decision. *See Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F. Supp. 656, 665 (E.D. Cal.  
16 1986), *aff'd in part and rev'd in part on other grounds* 828 F.2d 514 (9<sup>th</sup> Cir. 1987). Rule 59(e) of  
17 the Federal Rules of Civil Procedure provides that any "motion to alter or amend a judgment shall be  
18 filed no later than 10 days after entry of the judgment." Furthermore, a motion under Fed. R. Civ. P.  
19 59(e) "should not be granted, absent highly unusual circumstances, unless the district court is  
20 presented with newly discovered evidence, committed clear error, or if there is an intervening change  
21 in the controlling law." *Herbst v. Cook*, 260 F.3d 1039, 1044 (9<sup>th</sup> Cir. 2001), *quoting McDowell v.*  
22 *Calderon*, 197 F.3d 1253, 1255 (9<sup>th</sup> Cir. 1999).

23 The Court will deny plaintiff's first motion for reconsideration (docket #23). A  
24 preliminary injunction is an extraordinary remedy, and the right to relief must be both clear and  
25 unequivocal before a court will grant an injunction. *See Schrier v. University of CO*, 427 F.3d 1253,  
26 1258 (10<sup>th</sup> Cir. 2005). A preliminary injunction will only be granted if the requesting party  
demonstrates either: (1) a combination of probable success on the merits and the possibility of  
irreparable harm; or (2) the existence of serious questions going to the merits and the balance of  
hardships tips sharply in favor of the requesting party. *LGS Architects, Inc. v. Concordia Homes of*  
*Nevada*, 434 F.3d 1150, 1155 (9<sup>th</sup> Cir. 2006); *Sony Computer Entertainment Am., Inc. v. Bleem,*  
*LLC*, 214 F.3d 1022, 1025 (9<sup>th</sup> Cir. 2000). The two formulations represent a sliding scale where the

1 degree of irreparable harm required increases as the probability of success decreases. *LGS*  
2 *Architects*, 434 F.3d at 1155 (citations omitted). A movant with questionable claims does not meet  
3 the likelihood of success criterion. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*,  
4 527 U.S. 308, 340 (1999).

5 Plaintiff has failed to demonstrate entitlement to relief from the Court's order denying  
6 the motions for preliminary injunction under either Rule 60(b) or 59(e) of the Federal Rules of Civil  
7 Procedure. Plaintiff has not shown a probability of success on the merits of this civil rights action.  
8 As this Court noted in its order, with respect to the allegations made, plaintiff has not demonstrated  
9 the possibility of irreparable harm. The United States Constitution does not mandate that  
10 correctional facilities make typewriters available to inmates. *See Lindquist v. Idaho State Board of*  
11 *Corrections*, 776 F.2d 851, 858 (9th Cir. 1985). Moreover, while an authorized, intentional  
12 deprivation of property is actionable under the Due Process Clause, *see Hudson v. Palmer*, 468 U.S.  
13 517, 531-32 (1984), plaintiff has not shown that he has state-created property or liberty interest.  
14 Even if such a property or liberty right existed, authorized deprivations of property are permissible if  
15 carried out pursuant to a regulation that is reasonably related to a legitimate penological interest.  
16 *Turner v. Safley*, 482 U.S. 78, 89 (1987). In this case the Nevada Department of Corrections banned  
17 typewriters in response to an incident in which part of a typewriter was used by an inmate as a  
18 weapon. Thus, it appears that NDOC had a legitimate penological interest. This Court found, in  
19 *Nevada Department of Corrections v. Cohen*, 2008 WL 4539382, at \*3 (D. Nev. 2008), that the  
20 NDOC's ban on typewriters did not violate due process, even if the ban constituted a deprivation of  
21 property.

22 With respect to plaintiff's retaliation claim, again plaintiff has not shown likely  
23 success on the merits. Allegations of retaliation against a prisoner's First Amendment rights to  
24 speech or to petition the government may support a section 1983 claim. *Rizzo v. Dawson*, 778 F.2d  
25 527, 532 (9th Cir. 1985); *see also Valandingham v. Bojorquez*, 866 F.2d 1135 (9th Cir. 1989).  
26 Plaintiff must allege that defendants acted to retaliate for his exercise of a protected activity, and

1 defendants' actions did not serve a legitimate penological purpose. *See Barnett v. Centoni*, 31 F.3d  
2 813, 816 (9th Cir. 1994); *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995). Again, it appears that  
3 NDOC has a legitimate penological interest in banning inmate typewriters. *See Nevada Department*  
4 *of Corrections v. Cohen*, 2008 WL 4539382, at \*6-7 (D. Nev. 2008).

5           The Court will also deny plaintiff's second motion for reconsideration (docket #24).  
6 The Court, in screening the plaintiff's complaint, found that plaintiff's allegations of wanton  
7 negligence, deprivation of property, and retaliation were sufficient to state a claim (docket #14).  
8 However the Court determined that plaintiff's claims of civil conspiracy, misconduct, malfeasance,  
9 and negligence did not state viable claims. The Court also found that the allegations against certain  
10 defendants did not state a claim. The Court noted further amendment would be futile. Plaintiff has  
11 not made an adequate showing under either Rule 60(b) or 59(e) that this Court's order should be  
12 reconsidered or reversed.

13           **IT IS THEREFORE ORDERED** that plaintiff's motions for reconsideration  
14 (docket #23 and #24) are **DENIED**.

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16           DATED this \_\_\_\_\_ 5<sup>th</sup> day of December, 2008.

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20 CHIEF UNITED STATES DISTRICT JUDGE  
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